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No. 81-38

IN THE SUPREME COURT OF THE UNITED STATES
Oct. Term 1981

MARY ELLEN CRAWFORD, a minor etc., et al,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

ON WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

BRIEF OF AMICI CURIAE MARGARET TINSLEY ET AL IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici Margaret Tinsley et al. are parents of school children residing within several elementary school districts in a 12-mile diameter area south of San Francisco, California, who filed a state court action in 1976 seeking relief from de facto school segregation (Tinsley v Palo Alto Unified School District, et al.), now pending in the California Court of Appeal, First District (No. 1 Civ. 50997) and stayed by that Court until this Court's disposition of Crawford. Tinsley also involves the constitutionality of Proposition 1. The basic facts of Amici's case may be found in the opinion on an earlier appeal (1979) 91 Cal.App.3d 871, 154 Cal. Rptr 591. Tinsley is further described in Argument II.

SUMMARY OF THE ARGUMENT

I. Proposition 1 stigmatizes minority children and their parents, in violation

of the central purpose of the 14th Amendment (Strauder v West Virginia (1880) 100 U.S. 303, 25 L.Ed. 664), by declaring that desegregation must stop and resegregation must occur to preserve racial "harmony and tranquility" in public schools, meaning that school desegregation causes racial strife and turmoil in such schools. This language necessarily will be understood by minority children (and their parents) to mean they cause such strife and turmoil, an impermissible "overbroad generalization . . . which demean[s] the ability or social status of" minority children (cf., Michael M. v Superior Court (1981) 450 U.S. 464, 101 S. Ct. 1200, 1204) and "risk[s] . . . reinforcing" racial "stereotypes" (cf., Orr v Orr (1979) 440 U.S. 268, 283, 99 S. Ct. 1102, 1113-1114), in a manner deeply offensive to the 13th and 14th Amendments--the very purpose of which was to prevent states from stigmatizing whole racial groups as

unfit for civil society.

II. Proposition 1's real objective is perpetuation of school segregation for its own sake. It relieves school boards of any duty to "assign" pupils, let alone bus them short distances, even where students can safely walk, or bicycle (as in Amici's case) to a nearby school, and thus where the supposed "compelling public interests" cannot justify the law.

III. Proposition 1's purported "incorporation" of the 14th Amendment's de facto-de jure classification does not validate that classification in its state law setting. Proposition 1 is inconsistent in purpose and effect with the 14th Amendment because it fails to prevent resegregation of minority students already desegregated under a preexisting plan, and otherwise encourages perpetuation of both de facto and de jure segregation. (See also I and II.)

ARGUMENT

I. Proposition 1, on its face, violates the Thirteenth and Fourteenth Amendments because its very language stigmatizes minority children and minorities generally.

Proposition 1, in its last ¶, states:

> In amending this subdivision [i.e., § 7(a) of Art. I, Calif. Const.], the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of . . . preserving harmony and tranquility in this state and its public schools. . . . (Emphasis added)

Proposition 1, on its face, further declares that to preserve harmony and tranquility it is "necessary" to reopen final desegregation judgments in order to resegregate pupils already desegregated under state court order. (Proposition 1, § 2, as read together with the compelling interests in ¶ 5.)

The court below relied upon five of the seven "compelling public interests"

(113 Cal.App.3d at 654-655, 170 Cal.Rptr. at 509), but studiously refrained from even mentioning the "harmony-tranquility" reason.[1] This omission fairly can be taken as an implied concession that such a reason will not support the Proposition, and is not a legally permissible reason. That is surely correct, but the defect in the "harmony-tranquility" clause goes far beyond that.

A. The language of the harmony-tranquility clause itself, and when read with the language of the reopening of judgments clause, stigmatizes minority children and minorities generally.[2]

1. A century ago this Court held that racially stigmatizing laws were the principal target of the Fourteenth

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[1]The court also omitted mention of the last listed "compelling" interest--"protecting the environment."

[2]This Argument may not be within the scope of the second "Question Presented" on which certiorari was granted. The same is true of some of the following Arguments in II and III, infra. Some of

(Footnote is continued on the next page.)

Amendment, and that the main purpose of the Amendment must be kept "steadily in view"--to protect "those who had long been regarded as an inferior and subject race" against "unfriendly legislative action in the states" by providing them with "exemption from . . . legal discriminations, implying inferiority in civil society." The Court held that a statute limiting jury services to whites was "practically a brand upon" blacks "affixed by the law" and "an assertion of their inferiority. . . ." Strauder v. West Virginia (1880) 100 U.S. 303, 308

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them may not be raised by petitioners Crawford et al. Amici realize that the Court therefore may ignore these arguments if it so desires. United Parcel v. Mitchell (1981)--U.S.--, 101 S. Ct. 1559 at 1562 n. 2; Bell v. Wolfish (1979) 441 U.S. 520, 532 n. 13, 99 S. Ct. 1861 at 1870 n. 13.

However, Amici raise constitutional issues which are narrower than the first two Questions upon which the writ was granted, and this Court may prefer to decide the case on these narrow grounds. (Amici do not address Question No. 3.)

25 L.Ed. 664, 666. Just two terms ago this Court emphatically reaffirmed the broad meaning of Strauder. Rose v. Mitchell (1979) 443 U.S. 545, at 555, 99 S. Ct. 2993, at 2999-3001.[3]

2. The "harmony-tranquility" clause refers not only to preserving harmony and tranquility "in this state" but also more specifically, "in . . . its public schools." Of course, the language refers to racial harmony and racial tranquility and means that its opposite is occurring

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[3]In Rose the Court said:

> It is clear from the earliest cases applying the Equal Protection Clase in the context of racial discrimination in the selection of a grand jury, that the Court from the first was concerned with the broad aspects of racial discrimination that the Equal Protection Clause was designed to eradicate, and with the fundamental social values the Fourteenth Amendment was adopted to protect, even though it addressed the issue in the context of reviewing an individual criminal conviction. (Emphasis added)

in desegregated schools. (See, e.g., Ballot Pamphlet, "Argument in favor of Proposition 1," by State Senator Robbins, author of Proposition 1 in the Legislature, referring to "racial tension and strife" as "counterproductive to our goal of maximum racial harmony").[4] This means that public schools are disrupted by

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[4]The Court below totally ignored the Ballot Pamphlet, which under long-settled California Law is considered the "legislative history" of constitutional amendments and a proper source of their intent and meaning. E.g., Fujii v. California (1952) 38 Cal.2d 718, 242 Pac.2d 617 (invalidating Alien Land law as in truth a racial classification, and resorting to the ballot pamphlet to show "the real purpose of the law"; Board of Supervisors v. Lonergan (1980) 27 Cal. 3d 855, 864-866, 167 Cal.Rptr. 820, 825-826; Amador Valley v. State Board (1978) 22 Cal.3d 208, 149 Cal.Rptr. 239; White v. Davis (1975) 13 Cal.3d 757, 120 Cal.Rptr. 94, 105-106; Carter v. Seaboard Finance (1949) 33 Cal.2d 564, 203 Pac. 2d 758, 769; In Re Quinn (1973) 35 Cal.App.3d 473, 110 Cal.Rptr. 882, 887.

The failure of the Court below to examine this legislative history to determine the effect and intent of Proposition 1 also violates Arlington Heights v. Metro Housing Corp. (1977) 429 U.S. 252, 97 S. Ct. 555, 565.

desegregation, and a common sense[5] inference is that minority children disrupt education when they transfer to formerly "white" schools. And ¶ 2 of Proposition 1 means that disruption is so serious that it is "necessary" to resegregate students already desegregated.

The only other possible interpretation of this language is that whenever there is desegregation, there is racial disharmony caused by children of both races. But, even if the words could be read to chastise all races "equally",[6]

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[5]California constitutional amendments must be given a "practical, common-sense construction." Amador Valley Jt. Un. H.S. Dist. v. State Board (1978) 22 Cal.3d 208, 245, 149 Cal.Rptr. 239, 257.

[6]If there are any other conceivable meanings, this Court should not assume it will be construed more narrowly by California courts. Such construction in no way could obviate the meaning minorities are bound to attribute to the language. Whatever scope of review may be applicable to other parts of Proposition 1 (see infra, pp. 22-33, 55), it seems beyond dispute that any statutory language

minority children, their parents, and other members of minority groups nonetheless will read this language to mean that they are responsible for racial strife and turmoil in the schools. Majority children and their parents are quite unlikely to understand it as describing them, and even if they do, it does not stigmatize them as a group with a badge of incivility and inferiority as it does minority group members. CF. e.g., Hunter v. Erickson (1969) 393 U.S. 385, 89 S. Ct. 557; Loving v. Virginia (1967) 388 U.S. 1, 87 S. Ct. 1817.

3. The language of Proposition 1 thus stigmatizes all minority children for the alleged misconduct of a few.

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that appears to stigmatize minorities should be subject to "strict scrutiny." And the rules applicable to First Amendment cases should apply here. (CF. Harlan, J., concurring in McLaughlin v. Florida (1964) 379 U.S. 184, 197, 85 S. Ct. 283, 291.) See NAACP v. Button (1963) 371 U.S. 415, 83 S. Ct. 328, at 337, 338, 339, 340; Baggett v. Bullitt (1964) 377 U.S. 360, 84 S. Ct. 1316, quoted infra at 55-56.

This Court in other contexts has condemned "overbroad generalizations . . . which demean the ability or social status of the affected class" (Michael M. v. Superior Court (1981) 450 U.S. 464, 468, 101 S. Ct. 1200, at 1204 (plurality) (sex discrimination)); rejected claims that "public safety" justifies state actions reflecting generalizations about misconduct by certain whole groups (Village of Schaumberg v. Citizens (1980) 440 U.S. 620, at 637-638, 100 S. Ct. 826, at 836-837; cf., United States v. Clark (1980) 445 U.S. 23, 100 S. Ct. 895, at 901); and invalidated classifications that "risk . . . reinforcing . . . stereotypes." (Orr v. Orr (1979) 440 U.S. 268, 283, 99 S. Ct. 1102, 1113-1114). Thus, even if a few minority children are responsible for racial strife and turmoil in California schools (as are some "majority" children), the generalization made in Proposition 1 is deeply offensive to the Thirteenth and Fourteenth Amendments--the very purpose of which was to

prevent states from categorizing an entire class of people as unfit for civil society because of their race.[7]

4. Put another way, the language of Proposition 1 must be read in its historical context. City of Newport v. Fact Concerts, Inc. (1981)--U.S.--, 101 S. Ct. 2748, at 2755 (post-Civil War enactments not to be considered in an "historical vacuum").[8] The historical context--and a major reason why minorities will understand this clause

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[7]The "harmony" language also reflects another sweeping generalization--that all desegregation leads to serious racial strife. This is nonsense, as this Court knows. See Dayton Board of Education v. Brinkman (1977) 433 U.S. 406 at 421, 97 S. Ct. 2766 at 2776.

[8]School segregation is a legacy of slavery. See the opinion of the Court by Harlan, J., in South Carolina v. Katzenbach (1966) 383 U.S. 301, 311, n. 10, 86 S. Ct. 803, 809 n. 10; Brunson v. Board of Trustees (4th Cir. 1970) 429 F.2d 820, 825 (Sobeloff, J., concurring); United States v. School Commissioners of Indianapolis (7th Cir. 1974) 503 F.2d 68, 85 ("no less than a return to the spirit of Dred Scott").

as stigmatizing them--is that the need for racial peace and harmony has been given as the justification for every other retrogressive racial action throughout the history of this country, all stigmatizing minorities. This is the language of Dred Scott,[9] where the Court "interpreted" the term "citizen" in the Diversity Clause to exclude all blacks (slave or free, North and South) and their descendants forever, because otherwise blacks as "citizens" free to move as such through any state "would be dangerous to the peace and safety" of the slave states, be exempt from the slave codes which those states "deemed . . . absolutely essential to [their] own safety," and would produce "discontent and insubordination" among the slaves

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[9]Dred Scott v. Sanford (1857) 60 U.S. (19 How.) 393, 15 L.Ed. 691.

therein. (60 U.S. (19 How.) at 418, 425, 15 L.Ed. at 706, 709) It is literally the language of Justice Wayne, concurring in Dred Scott (Id., 60 U.S. (19 How.) at 455, 15 L.Ed. at 721):

> The case involves private rights of value, and constitutional principles of the highest importance, about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them now. . . (emphasis added).

Without intending to exaggerate, the language of Proposition 1 appears to be, in "a form more subtle than before [b]ut . . . not less real or pernicious" (Rose v. Mitchell (1979) 443 U.S. 545, at 558, 99 S. Ct. 2993, at 3001)[10] a modern-day affirmation of Dred

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[10]"[W]e also cannot deny that, 114 years after the close of the War Between the States and nearly 100 years after Strauder, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more sutble than before. But it is not less real or pernicious."

Scott's dictum that blacks are "altogether unfit to associate with the white race."[11]

The harmony clause and the "resegregation clause" together also revive the principle of Plessy v. Ferguson ((1896) 163 U.S. 537, 16 S. Ct. 1138, which justified state laws enforcing racial segregation because "the state

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[11]Scott v. Sanford, supra. Chief Justice Taney said, in the majority opinion, that blacks were separated from whites by "indelible marks," that "the stigma, of the deepest degradation, was fixed upon the whole race," that even in the North "the strongest mark of inferiority and degradation were fastened upon" them, and that a whole class of human beings was "thus stigmatized." He also said that blacks, free or slave, North and South, ". . . had for more than a century before [the Constitution] been regarded as beings of an inferior order; and altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect. . . . [A] perpetual and impassable barrier was intended to be erected between the white race and the one they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they looked upon as . . . far below them in the scale of created beings. . . . And no distinction in this respect was made between the free negro or mulatto and the slave, but the stigma, of the deepest degradation, was fixed upon the whole race."

legislature is at liberty to act . . . with a view to the . . . preservation of public peace and good order." It is the language used to justify enforced neighborhood segregation in Buchanan v. Warley (1917) 245 U.S. 60, 38 S. Ct. 16; and in more recent times to justify continued racial segregation in public schools, recreational facilities, and housing. Brown v. Board of Education (II) (1955) 349 U.S. at 294, 75 S. Ct. 753; Cooper v. Aaron (1958) 358 U.S. 1, 78 S. Ct. 1401, at 1409; Watson v. Memphis (1963) 373 U.S. 526, 83 S. Ct. 1314, 1320. See United States v. Board of Sch. Comm'rs of Indianapolis (7th Cir. 1974) 503 F.2d 68, 84, cert. denied 421 U.S. 929, 95 S. Ct. 1655 (affirming trial court's exclusion of evidence offered to prove that "busing for purposes of integration did not lead to . . . interracial harmony"); Hunter v. Erickson, supra, 393 U.S. 385,

at 392, 89 S. Ct. 557, at 561. It is the language used to justify deprivation of the rights of minorities to peaceably assemble and speak against racial segregation. E.g., Cox v. Louisiana (1964) 379 U.S. 536, 85 S. Ct. 453, at 462; Edwards v. South Carolina (1963) 372 U.S. 229, 83 S. Ct. 680; CF. NAACP v. Alabama (1964) 377 U.S. 310, 84 S. Ct. 1302, 1315.

In light of history, three justices of this Court plainly were correct in principle in saying (City of Memphis v. Greene (1981)--U.S.--, 101 S. Ct. 1584, at 1604):

> The stated explanation for the closing [of a street] is of a sort all too familiar: 'protecting the safety and tranquility of a residential neighborhood' by preventing 'undesirable traffic' from entering it. Too often in our Nation's history statements such as these have been little more than code phrases for racial discrimination . . . .

(Marshall, Brennan and Blackman, JJ, dissenting).[12]

5. In Plessy, eight members of the Court opined that the Louisiana railroad segregation law did "not necessarily imply the inferiority of either race to the other," and that:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races [by statute] stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it . . . .

To eliminate the vestiges of Plessy, expressions like that in Proposition 1 must be viewed (insofar as possible) through the eyes of minorities--as this Court had no trouble doing in Strauder v. West Virginia, --and, from that perspective, language

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[12]The majority also indicated that certain actions having a symbolic stigmatizing effect could violate the Thirteenth Amendment.

must be assessed in terms of its "real meaning," as Justice Harlan put it, dissenting in Plessy.[13] That is just what this Court has been doing at least since Brown v. Board of Education. This Court has consistently recognized that elimination of racially stigmatizing state action was a central purpose of the post-Civil War Amendments.[14] See, e.g., Wright v. City of Emporia (1972) 407 U.S. 451, 466, 92 S. Ct. 2196, 2205. CF. Norwood v. Harrison (1973) 413 U.S. 455, 93 S. Ct. 2804; Reed v. Rhodes (6th Cir. 1980)

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[13](163 U.S. at 558, 16 S. Ct. at 1146.)

[14]See also Rose v. Mitchell (1979) 443 U.S. 545, 99 S. Ct. 2993, at 2999; City of Richmond v. United States (1975) 422 U.S. 358, 95 S. Ct. 2296, 2307 ("gross racial slur"); Columbus Board of Education v. Penick (1979) 439 U.S. 1348, 99 S. Ct. 2982, at 2992. (Rehnquist and Powell, JJ, dissenting) ("stigma"); Regents v. Bakke (1978) 438 U.S. 265, 98 S. Ct. 2733, at 2783 (Brennan, White, Marshall and Blackmun, JJ, concurring).

607 F.2d 714, cert. denied 445 U.S. 935, 100 S. Ct. 1329.

B. The "harmony-tranquility" clause as it relates to racial strife "in" California's "public schools," invalidates the whole of Proposition 1.

1. It is doubtful that any law more offensive on its face to the Fourteenth Amendment has come to this Court for review since Loving v. Virginia (1967) 388 U.S. 1, 87 S. Ct. 1817. Most segregation laws stigmatized minorities, not so much in terms, but inferentially in the racial classifications they embodied. Here, the language on the face of the Proposition itself stigmatizes minorities, especially children. No argument is required to demonstrate that a statutory provision that in its very words stigmatizes minorities is invalid. Nor does it matter whether there was an underlying intent or purpose to stigmatize--the law

either stigmatizes or it does not. It would be a constitutional absurdity to uphold a stigmatizing law for lack of proof of such intent or purpose--the harm is exactly the same whether the authors intended to stigmatize, acted in reckless disregard of the effect of the language, or were simply negligent or totally unthinking. Moreover, this is not a "disproportionate impact" situation; Proposition 1 is a racial law and as such discriminatory intent should be conclusively presumed. See, e.g., Personnel Adm'r v. Feeney (1979)--U.S.--, 99 S. Ct. 2282.

Accordingly, there is no need here for undertaking a "sensitive inquiry" into direct or circumstantial evidence of "purpose" or "intent". (Arlington Heights v. Metro Housing Auth., supra, 429 U.S. at 266, 97 S. Ct. at 564.) But assuming there is, the controlling

principle is that "for the purpose of discovering the mind of the legislature," a "law is the best expositor of itself" (Pennington v. Coxe (1804) 1 U.S. (2 Cr.) 346, 348) (Marshall, C. J.). Purpose and intent may be derived from the very language of a statute, a rule long followed in this Court and in the California Courts as well.[15] No further inquiry is required or warranted.[16]

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[15]Philbrook v. Glodgett (1975) 421 U.S. 707, 95 S. Ct. 1893, 1898; Boys Market v. Retail Clerks Union (1970) 398 U.S. 235, 90 S. Ct. 1583, 1592; Richards v. United States (1962) 369 U.S. 1, 9, 11, 82 S. Ct. 585, 591-592; CF. Watt v. Energy Action Ed. Foundation (No. 81-1464, 12/1/81) --U.S.--,--S. Ct.--; Moyer v. Workmen's Compensation Appl. Board (1973) 10 Cal.3d 222, 110 Cal. Rptr. 370, 373-374; Prouty v. Bank of Am. (1974) 37 Cal.App.3d 430, 112 Cal.Rptr. 370, 373, 374; Rosenthal v. Hansen (1973) 34 Cal.App.3d 754, 110 Cal.Rptr. 257, 261; People v. Fowler (1938) 32 Cal.App.2d Supp. 737, 84 Pac.2d 326.

[16]The compelling public interest in eliminating racial strife "in this state" also is an invalid purpose and objective. This language appears to refer to majority community hostility to desegregation. CF. Buchanan v. Warley, Brown v. Board of Education (II), Cooper v. Aaron, and Watson

(Footnote continued on the next page.)

II. The unlimited geographic reach of Proposition 1's repeal of the prior state consitutional requirement demonstrates that the "compelling public interests" were not the real reasons for its adoption, and that the real reason was segregation for its own sake.

A. The reach of Proposition 1's repeal of the prior state duty to desegregate is by no means limited to Los Angeles, nor was it intended to be. The Legislature intended Proposition 1

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v. Memphis, all supra, and Penick v. Columbus Board of Education (S.D.Oh. 1977) 429 F.Supp. 229, 253-254, aff'd (6th Cir. 1978) 583 F.2d 787, aff'd (1979) 443 U.S. 449, 99 S. Ct. 2941. While those decisions rejected community hostility as a reason to deny or delay admitted federal rights, the same principle has been applied in determining whether school desegregation is de facto or de jure. Courts have held that proof of refusal to desegregate because of community hostility is itself evidence of a de jure intent. Even cross-district busing has been ordered based upon that principle. See, e.g., United States v. School District of Omaha (8th Cir. 1975) 521 F.2d 530, 539, 541, 544, cert. denied 423 U.S. 946, 96 S. Ct. 361; United States v. Missouri (8th Cir. 1975) 515 F.2d 1365, 1367, (crossdistrict busing); United States v. Board of Sch. Comm'rs of Indianapolis (7th Cir. 1980) 637 F.2d 1101, cert. denied 449 U.S. 838,--S. Ct.--, aff'g (S.D. Ind. 1978) 456 F.Supp. (Footnote continued on the next page.)

to halt and prevent desegregation throughout the State of California.[17] The "reach of" Proposition 1 is "far in excess of its justificable purposes" (if any). CF. Lalli v. Lalli (1978) 493 U.S. 259, 273, 99 S. Ct. 518, 527. Since that is so, "This Court need not . . . accept at face value assertions of legislative

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183 (same); Accord: Tinsley v. Palo Alto Unified School Distict (I) 91 Cal.App.3d 841, 154 Cal.Rptr. 591; Stanton v. Sequoia High School District (N.D. Calif. 1976) 408 F.2d F.Supp. 502, 518; Morgan v. Kerigan (1st Cir. 1974) 509 F.2d 580, 587. Cf., Griffin v. Prince Edward City School Board (1964) 377 U.S. 218, 231, 84 S. Ct. 1226, 1233.

These decisions make perfect sense; racial hostility toward minority groups was one of the basic problems the Fourteenth Amendment was designed to deal with. (E.g., Strauder v. West Virginia, supra, 100 U.S. 303, 25 L.Ed. 664, Rose v. Mitchell, supra. And, if pandering to majority hostility is itself evidence of de jure intent, that same hostility hardly can be a valid reason not to desegregate, even de facto circumstances.

[17]Proposition 1, ¶ 1 ("any public . . . board"); Ballot Pamphlet, pp. 6, 9.

purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." Weinberger v. Weisenfeld, 420 U.S. 636, 648 n. 16, 95 S. Ct. 1225, 1233 n. 16; Orr v. Orr (1979) 440 U.S. 268, 280 n. 10, 98 S. Ct. 1102, 1112 n. 10; Califano v. Westcott (1979) 443 U.S. 76, 99 S. Ct. 2655, 2662-2663; Michael M. v. Superior Court (1981) 450 U.S. 464, 101 S. Ct. 1200, 1205. Nor does it matter which scope of review is applied to Proposition 1's "repealing" paragraph--"strict scrutiny," "intermediate scrutiny" (as in the foregoing cited cases), or merely "rational basis"[18]. Under any level of review the reach of Proposition 1

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[18]The modern "rational basis" test is set forth in Schweiker v. Wilson (1981) 450 U.S. 221, 101 S. Ct. 1074, 1080, 1082, 1083.

cannot be justified by any of the enumerated "compelling interests" or any other "interests" that the court below invoked (see infra, p. 33, note 31).

B. Proposition 1 relieves school boards, not merely of the duty to "bus", but also of any duty "with respect to the use of pupil school assignment." This is a more far-reaching provision than the "transportation" limitation. It eliminates any duty of school boards to alleviate de facto segregation by any means that possibly could achieve that result in all or virtually all circumstances. The various methods of desegregation which the court below believed were still available[19] all involve pupil "assignment" and thus there is no duty left to use any

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[19]113 Cal.App.3d at 648, 651, 652, 170 Cal.Rptr. at 505, 507, referring to statements in Crawford (I) (1976) 17 Cal.3d 280, 286, 305 and n. 17, 130 Cal.Rptr. 724, 726-727, 740 and n. 17.

of those methods. The result is that Proposition 1 exonerates every school board from any duty to transfer pupils to a school even two blocks farther away from home and to which pupils can walk; or to schools to which they can safely bicycle, let alone to schools to which they can be bused in a very few minutes over a very few miles.

That being so, the "compelling interests" can not have been the reason for the Proposition's enactment. Assignments which do not involve the use of busing, or which in part do involve busing but only for a few minutes over short distances to reasonably nearby schools, would not jeopardize the "health and safety of all [or any] public school pupils" by long bus rides on dangerous roads; would not hamper the "ability of parents to participate in the educational

process"[20]; would not "waste . . . scarce fuel resources," would not damage "the environment" by automobile exhaust pollution,[21] and would not interfere with "making the most effective use of the limited financial resources now and prospectively available to support public education." (Indeed, the reverse probably is true.) Finally, whatever is meant by the vague phrase "maximizing the educational opportunities for all public school pupils,"[22] it is difficult to see how that objective could be impaired by reassigning pupils to schools within walking or bicycling distance or within short bus riding distances. Accordingly, Proposition 1's real purpose and objective must be segregation for its own

[20]Compare Cal.Ed. Code §§ 37000.5, 37001.

[21]This "interest" was not mentioned by the court below as justifying the proposition.

[22]See United States v. Board of School Commissioners of Indianapolis, supra, 503 F.2d at 84.

sake--an invalid purpose and objective, needless to say.[23] (See II (C), infra pp. 38.)

C. Tinsley v. Palo Alto Unified Sch. Dist. (II), now pending before the California Court of Appeal, First District (San Francisco) No. 1 Civil 50997, stayed pending this Court's decision in Crawford

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[23]Petitioners Crawford et al. should be permitted to take advantage of the application of Proposition 1 to other school distict situations, even assuming some of the "compelling interests" may apply to Los Angeles. As in First Amendment cases (Village of Schaumberg v. Citizens, supra, 440 U.S. 620, 100 S. Ct. 826, 834-835), the "overbreadth" of the Proposition will necessarily have a "chilling effect" upon other school districts, and thus deprive children in those other districts of equal protection rights at least as important as First Amendment rights. CF. Harlan, J., concurring in McLaughlin v. Florida (1964) 379 U.S 184, at 197, 85 S. Ct. 283, at 291: "The fact that these cases [involving "necessity"] arose under the principles of the First Amendment does not make them inapplicable here. Principles of free speech are carried to the states only through the Fourteenth Amendment. The necessity test which developed to protect free speech against state infringement should be equally applicable in a case involving state racial discrimination--prohibition of which lies at the very heart of the Fourteenth Amendment." (Emphasis added)

(II), is an example of the overreaching aspect of Proposition 1. Tinsley demonstrates that the discussion in II(B) just above is not addressed to purely hypothetical situations.

In Tinsley (I) (1979) 91 Cal.App.3d 871, 154 Cal.Rptr. 591, hearing denied by California Supreme Court, the Court of Appeal held that the State Constitution required inter-district desegregation upon proof that minority school children were racially isolated. Of the elementary schools in the Ravenswood City School District (a minority enclave surrounded by affluent "white" districts in the Mid Peninsula),[24] four each had 98% minority enrollment and the fifth had 73%. A map of all the involved school districts lodged by Amici with the Clerk of this Court as Exhibit A to this brief

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[24]An area 20-30 miles south of San Francisco.

can be judically noticed here inasmuch as the California Court did so. (91 Cal.App.3d at 891, 154 Cal.Rptr. at 603.)

The map shows that the diameter of the total area encompassing all the elementary school districts is only 12 miles measured east to west, and 12 and 3/4 miles measured north to south. The practical distances are much less, e.g., as the crow flies, 4 miles from the center point of the segregated Ravenswood District to the center point of the Palo Alto District; 3 miles from the center point of the Ravenswood District to the center point of the Menlo Park District; and only 7 miles from the center points of each of the two districts the greatest distance from Ravenswood (Portola Valley and Woodside) to the center point of Ravenswood. Moreover, the distances from the Ravenswood District to the closest other districts are so short

that obviously it is entirely feasible for some pupils living in four of the defendant districts--Ravenswood, Palo Alto, Redwood City and Menlo Park--to bicycle to and from schools in the other districts quickly and safely.[25]

The Court of Appeal also noted comparative standardized performance test scores "for the school years 1974-1975

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[25]In the appeal in Tinsley (II) Amici advised the Court of Appeal as follows:

> Although U.S. 101, the Bayshore Freeway, separates East Palo Alto [where the segregated Ravenswood District is located] from Palo Alto and parts of Menlo Park, there are three easily accessible overpasses. The Court may judicially notice these physical facts. In fact, which can be proved at trial and is indisputable (although not reflected in this record), black children living in the Ravenswood District attend several elementary schools outside the Ravenswood District, e.g., St. Albert the Great Catholic Church School located in Palo Alto, and Nativity Catholic Church School located in Menlo Park, and transport themselves there by bicycle. (Emphasis in the original) (Appellant's Closing Brief, Tinsley et al. v. Palo Alto Unified School District et al., pp. 3-4, filed June 26, 1981 in Court of Appeal, First District, Division One, No. 1 Civil 50997.

and 1975-1976," and summarized the results (91 Cal.App.3d at 893, note 12, 154 Cal. Rptr. at 605, note 12).[26] The 1975-1976 results were derived from Exhibit C to the amended complaint:

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[26]"In 1974-1975, the range of performance of Ravenswood pupils was from the 3rd to 16th percentile as compared to a range of 43rd to 97th percentile in the other elementary schools. This discrepancy is emphasized if Redwood City (45th to 64th percentile) is omitted, because the remaining districts' students ranged from the 78th to the 97th percentile."

"In 1975-1976, the commensurate figures were from 4th to 34th percentile for Ravenswood district as compared to a range from 45th to 97th for pupils of the other schools--71st to 97th if Redwood City district is disregarded."

Profiles of School District Performance
California State Testing Program,
Expressed in State Percentiles

[1975-1976]

	Grade 2 Reading	Grade 3 Reading	Grade 6 Reading	Grade 6 Language	Grade 6 Spelling	Grade 6 Mathematics
Ravenswood	34	15	4	7	23	5
Palo Alto	95	91	95	94	92	95
Belmont	93	87	87	81	84	88
Las Lomitas	91	93	93	96	94	94
Menlo Park	96	88	96	97	96	94
Portola Valley	90	96	95	93	88	93
Redwood City	68	45	63	62	71	71
San Carlos	89	92	85	86	71	79
Woodside	82	97	90	86	86	94[27]

[27]The statistics for the school years 1978-1979 and 1979-1980 were attached to Amici's closing brief in the Court of Appeal. A copy of that Exhibit B has also been lodged with the Clerk of this Court as Exhibit B to this Brief. The figures for those two school years are about equally dismal.

The "Mid-Peninsula," where Tinsley was filed, is a suburban area, populated largely by highly educated upper and and middle class[28] professional, scientific, and technical people, and has highly desirable and successful schools (except Ravenswood). There is no reason to believe that desegregation in this area would lead to resegregation. The percentage of minority children is sufficiently low[29] that there is no reason for any school to reach the so-called "tipping point" that might result in "white flight." Desegregation was effectively accomplished in the area's

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[28]Compare Brennan, J., concurring in part in United Jewish Organizations v. Carey (1977) 430 U.S. 144, 174, 97 S. Ct. 996, 1014.

[29]For example, the total pupil population in the 8 South San Mateo County elementary districts was 19,553 (compare with 650,000 in Los Angeles), of which only 3,046 (15.5%) are minority, mostly concentrated in the defendant Ravenswood District (1976-1977 figures).

high schools,[30] and there is no reason to assume elementary desegregation could not succeed to a significant degree.[31]

The educational facts alleged in Tinsley show that desegregation is not pursued out of misplaced zeal for social experimentation, but is educationally necessary if the minority Ravenswood children ever are to break out of the cycle of miseducation to which they have been subjected for many years. But the Legislature, well aware of the educational crisis in Ravenswood, nonetheless intended

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[30]Tinsley (I), 91 Cal.App.3d at 897, 154 Cal.Rptr. at 607.

[31]The Court below said that voters "could" have been motivated by the concerns expressed by the dissent in Estes v. Dallas NAACP (1980) 444 U.S. 437, 100 S. Ct. 716, at 723. (113 Cal.App.3d at 655, 170 Cal.Rptr. at 509.) But the dissent was speaking of vast cities with "majority" populations in the minority and other problems not likely to occur in the Mid-Peninsula; it noted that conditions vary widely so that desegregation orders "must be drawn in the light of the circumstances present and the options available, . . . taking into account the practicalities of the situation." That is just what Proposition 1 fails to do. Far

(Footnote continued on the next page.)

to freeze in segregation there (see Ballot Pamphlet). Whatever may be true of Los Angeles, the Legislature and People of California had no reason to deliberately perpetuate de facto segregation in the Mid-Peninsula, other than a desire to perpetuate racial segregation for its own sake.

D. It cannot be disputed that Proposition 1's repeal of the prior California constitutional requirement is

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from disapproving any busing, the dissent approved of a plan that would have bused 20,000 pupils in Dallas, saying it "does have promise for success" (100 U.S. at 721).

"state action."[32] Many cases hold that in racial segregation contexts the Fourteenth Amendment may be violated by a state law repealing prior laws. Griffin v. Prince Ed. Cty. Sch. Bd. (1964) 377 U.S. 218, 222, 229-230, 231, 84 S. Ct. 1226, 1228, 1232, 1233 (state law repealing compulsory school attendance law, thus permitting school closure, invalid); Hall v. St. Helena Parish Sch. Bd. (E. D. La. 1961) 197 F.Supp. 649 (three-judge court), aff'd per curiam (1962) 368 U.S. 515, 82 S. Ct. 429 (same); Gomillion v. Lightfoot (1960) 364 U.S. 339, 344-345, 81 S. Ct. 125, 128-129 (state's power to repeal laws limited by federal Constutition); Rice v. Elmore (4th Cir. 1947) 165 F.2d 387, certiorari denied 333

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[32]"The test is not the form in which state power has been applied, but, whatever the form, whether such power has been exercised." New York Times v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 718 (emphasis added) (The "repealing" provision of Proposition 1 is in its first paragraph.)

U.S. 875, and the long series of other "white primary" case[33] United States v. Bd. of Sch. Comm'rs of Indianapolis (7th Cir. 1978) 573 F.2d 400, 406-407, cert. denied sub nom Bowen v. United States (1978) 439 U.S. 824, 99 S. Ct. 93, on remand (S.D. Ind. 1978) 456 F.Supp. 183, affirmed (7th Cir. 1980), 637 F.2d 1101, 1108, cert. denied 449 U.S. 838,--S. Ct.--; Lee v. Nyquist (W.D. N.Y. 1970) 318 F. Supp. 710 (three-judge court), aff'd per curiam 402 U.S. 935, 91 S. Ct. 1618; School Comm'rs of Springfield v. State Board (1974) 366 Mass. 315, 319 NE 2d 427, cert. denied (421 U.S. 947, 95 S. Ct. 1673[4]; see also

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[33]E.g., Smith v. Allwright (1944) 321 U.S. 649, 64 S. Ct. 757; Terry v. Adams (1953) 345 U.S. 461, 73 S. Ct. 809. See Gunther, Constutitional Law, Cases & Materials, pp. 927-929 (9th Ed. 1975).

[34]In Lee v. Nyquist and Springfield the courts considered and rejected claims that the repeals of state board powers to order de facto

(Footnote is continued on the next page.)

Hadnott v. Amos (1969) 394 U.S. 348, 89 S. Ct. 1101, 1115-1117.[35]

Repealing statutes have been invalidated in non-racial contexts as well.[36]

The principle of these cases is that even a repealer must have a valid purpose or object. In Griffin v. Prince Ed. Cty. Sch. Bd., this Court, noting that "the Assembly repealed Virginia's compulsory [school] attendance laws", held

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desegregation were valid because there was no underlying federal duty to desegregate in the de facto context.

[35]In Hadnott v. Amos this Court, under § 5 of the Voting Rights Act of 1964 (42 U.S.C. § 1973c), nullified a state voting law amendment that repealed an exemption available under a prior law. Section 5 could not have been upheld as applied to a repealer unless the Court agreed with Congress that a repealer could violate the Fifteenth Amendment.

[36]E.g., United States Trust Co. v. New Jersey (1977) 421 U.S. 1, 97 S. Ct. 1050 (repeal violated contract clause); Gelpeche v. Dubuque (1867) 68 U.S. (1 Wall.) 175, 17 L.Ed. 520, 525 (same); Truax v. Corrigan (1921) 257 U.S. 312, 331, 334, 341-342, 42 S. Ct. 124, 129-130, 133 (treating law as pro tanto repeal of state court's general jurisdiction statute; denied equal protection.

(377 U.S. at 231, 84 S. Ct. at 1233):

> Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional. (emphasis added)

The real purpose and object of California's repeal of the prior state constitution was to maintain segregation for its own sake; that "object" is not "a constitutional one"; therefore the Proposition violates the Fourteenth Amendment.

2. Respondent is expected to argue here that a state has carte blanche to repeal a law requiring de facto desegregation, because the prior law was not required to be enacted by the Fourteenth Amendment. We concede arguendo[37] that the repealed California constitutional

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[37]"Arguendo" only because California Supreme Court said in 1976 that "most of the currently segregated school systems in California would in all probability be found to be de jure segregated . . . ." Crawford v. Bd. of Ed. of Los Angeles (I) (1976) 17 Cal.3d 280, 301, 130 Cal.Rptr. 724, 737.

rule was not required by the Fourteenth Amendment, but the conclusion that it may be repealed at will is fallacious. Respondents may rely upon Dayton Bd. of Ed. v. Brinkman (I) (1977) 433 U.S. 406, 413-414, 97 S. Ct. 2766, 2772, and Id. (1979) 443 U.S. 526, 99 S. Ct. 2971, at 2976 n. 5 (Dayton II). But the Dayton cases do not support respondent's arguments.

Before passing on the validity of the school board's rescission of a resolution, this Court said in Dayton (I) that:

> The Board has not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. Reitman v. Mulkey 387 U.S. 369, 87 S. Ct. 1627, 18 L.Ed. 2d 830 (1967), but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date. (Emphasis added)

Only after thus carefully distinguishing the Dayton rescission of a mea culpa

resolution from the Reitman situation did this Court then hold that "We agree with the Court of Appeals' treatment of this action, wherein that Court said: 'If the [school] board was not under such a [federal constitutional] duty [to adopt the repealed resolution in the first place], then the rescission of the initial action in and of itself[38] cannot be a constitutional violation.'" Accordingly, far from having held that repeal of a law like the prior California constitution is valid if the State had no federal duty to enact it initially, this Court's "Reitman caveat" may be read to imply the broad principle (which

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[38]It should be kept in mind that Proposition 1 does much more than repeal the prior state constitutional interpretation; it also enacts positive law in its various provisions. The positive enactment is, needless to say, subject to review under the Fourteenth Amendment. Reitman v. Mulkey (1967) 387 U.S. 369; Hunter v. Erickson (1969) 393 U.S. 385, 89 S. Ct. 557. See Arguments I, supra, and III, infra.

Amici do not believe need be invoked here) that such an "operative" law cannot ever be repealed under any circumstances. The court below overlooked the Reitman caveat.[39]

Even ignoring the Reitman caveat, all the Dayton cases say is that a repeal "in and of itself"--i.e., without regard to its purpose, objective, or effect--"cannot be a constitutional violation." But a repeal still is subject to review for impermissible purpose or objective. Associated Gen'l Contractors v. S.F. Un. Sch. Dist. (9th Cir. 1981) 616 F.2d 1381, at 1390-1391, cert. denied.

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[39]113 Cal.App.3d at 653, 170 Cal.Rptr. at 508. Contrast NAACP v. Lansing Sch. Bd. (6th Cir. 1977) 559 F.2d 1042 n. 10, which read Dayton I correctly.

This Court in Dayton II made a statement similar to that in Dayton I but without the "Reitman caveat." But the reference was to the same resolution, and we assume the Dayton II footnote was not intended to overrule the Reitman reservation in Dayton I.

On that basis, Proposition 1 cannot survive. (Supra, Arg. I, II(A), (B), and III infra.)

If the Dayton cases really meant that any equal rights law could be repealed at will, absent a preexisting duty to enact the repealed law, that would have been inconsistent not only with Reitman but also with other decisions cited above, including Griffin v. Prince Ed. Cty. Sch. Bd., supra. The State in Griffin was under no federal constitutional duty to operate public schools in the first place, but repeal of the compulsory school law was nonetheless invalidated. That was true also of the similar Louisiana law in Hall v. St. Helena

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[40]E.g., The United States v. Indianapolis cases, supra p. 36; Lee v. Nyquist, supra; School Commissioners of Springfield v. State Board, supra; United States Trust Co. v. New Jersey, supra note 36 p. 37.

Parish School Board, supra, and other cases as well.[40]

The repeal cases are simply a corollary of the more general principle that under the Equal Protection Clause of the Fourteenth Amendment, the validity of state action is measured, not by reference to an underlying federal constitutional duty, but by whether the state action itself treats persons equally. Thus, in Rose v. Mitchell, supra, 443 U.S. at 557 n. 7, 99 S. Ct. at 3001 n. 7, this Court said:

> The fact that there is no [federal] constitutional requirement that States institute prosecutions by means of an indictment returned by a grand jury, see Hurtado v. California 110 U.S. 516, 4 S. Ct. 292, 28 L.Ed. 232 (1884), does not relieve those States that do employ grand juries from complying with the commands of the Fourteenth Amendment in the operation of those [grand] juries.[41]

[41]See also, e.g., Sweatt v. Painter (1950) 339 U.S. 629, 70 S. Ct. 851 (banning discrimination in public law school state not under federal duty to

(Footnote is continued on the next page.)

In Williams v. Rhodes (1968) 393 U.S. 23, 89 S. Ct. 5, the Court invalidated under the Equal Protection Clause a discriminatory state law regulating Presidential primary elections. Not only was there no underlying federal duty requiring the State to hold such elections, but also the federal constitution itself vests apparently unrestrained power to appoint Presidential electors "in such manner as the Legislature thereof may direct . . . ." (Art. II § 1 cl. 2). This Court held that was irrelevant (393 U.S. at 28-29, 80 S. Ct. at 9-10). Justice Harlan, concurring, agreed. (393 U.S. at 42, 89 S. Ct. at 16.)

The foregoing is not just another way of saying a de facto desegregation

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maintain); McLaurin v. Oklahoma Regents (1950) 339 U.S. 637, 70 S. Ct. 851 (same, segregated seating in graduate school classes). Brown v. Board of Education itself was an application of this principle.

law never can be repealed. Perhaps it can, if the repeal has a permissible purpose or objective. The situation here is no different than it would have been had California never adopted its prior requirement, but the state Legislature voted to not require any desegregation and openly declared its purpose was to maintain segregation for its own sake. In that case, such "inaction" with a discriminatory purpose would violate the Fourteenth Amendment. Arlington Heights, supra. The only difference here is that proof of a discriminatory purpose or objective exists, while in the inaction case proof would be difficult absent something like an official statement of illicit purpose. Arlington Heights, supra.

III. The purported "incorporation" by Proposition 1 of the federal "de facto"-"de jure" classification does not save its constitutionality, and other classifications and provisions in the Proposition also violate the 14th Amendment.

The court below held that "Proposition 1 embraces the protection of the Fourteenth Amendment and does not seek to violate it," and again--"we do not believe a state constitutional amendment can be said to violate the Fourteenth Amendment by specifically embracing it" (113 Cal.App.3d at 653, 654, 170 Cal.Rptr. at 508, 509).[42] The Court of Appeal's holding seems to be a syllogism, i.e., (a) any state law that "embraces" the 14th Amendment cannot violate that Amendment; (b) Proposition 1 does "embrace" the 14th Amendment; and (c) ergo, Proposition 1 cannot and does

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[42]"But a great principle of constitutional law is not susceptible of comprehensive statement in an adjective," verb or gerund. Cardozo, J., dissenting in Carter v Carter Coal Co. (1936) 298 U.S. 238, 327.

not violate the 14th Amendment. The logic is faulty. The major premise is incorrect, because there is no rule of law that a state enactment is valid ipso facto because it incorporates, borrows, or "embraces" a federal enactment. And the minor premise (not articulated in the quoted statement) is wrong because (1) a key provision of Proposition 1 does not adopt the "de jure"-"de facto" classification at all but is a different invalid classification; (2) another provision affirmatively encourages the perpetuation of both de jure and de facto segregation; and (3) other provisions also encourage de jure segregation by misleading school boards as to their federal constitutional duties. (See also Arguments I and II, supra.)

A. A state law incorporating a federal classification must stand or fall on its own merits, and if the law is invalid, the fact of incorporation is irrelevant.

1. The "Swann"[43] cases are directly in point. In North Carolina State Bd of Ed. v Swann a state law purported to adopt the "color blind" rule of Brown v Board of Education; in invalidating the law, Chief Justice Burger, for the Court, did not deny that was the rule of Brown, but held (402 U.S. at 45-46, 91 S. Ct. at 1286):

> The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the Swann case. But more important, the statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind";

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[43] Swann v Charlotte-Mecklenburg Bd of Ed (1971) 402 U.S. 1, 91 S. Ct. 1267; McDaniel v Baressi (1971) 402 U.S. 39, 91 S. Ct. 1287; North Carolina v Swann (1971) 402 U.S. 43, 91 S. Ct. 1284.

> that requirement, against the background of segregation, would render illusory the promise of Brown v Board of Education. (Emphasis added.)

In short, the purpose and effect of the state law incorporating the Brown rule were inconsistent with that rule itself. The Swann situation is precisely analogous to the incorporation here of the "de jure-de facto" classification. It was surely no part of the purpose of the 14th Amendment to permit states by law to stigmatize minorities (Argument I, supra); or affirmatively to act to perpetuate segregation for its own sake (Argument II, supra)[44] or otherwise to impinge upon Equal Protection rights (see infra III (B) and (C)).

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[44]Under this Court's decisions pure de facto segregation in school is not reached by the 14th Amendment, but that Amendment does not sanction, approve of, or encourage its perpetuation. It is merely neutral toward it, and a state also must observe "strict neutrality" toward de facto segregation. Cf., Norwood v Harrison (1973) 413 U.S. 455, 93 S. Ct. 2804 (private segregation not reached by 14th Amendment but state may not in any way support or encourage it). See infra III (C).

2. This Court also has held in other contexts that incorporation by state law of a federal classification does not automatically validate that law[45]. And see Murphy and Rutledge, JJ., concurring in Oyama v California (1948) 332 U.S. 633, 68 S. Ct. 269, 277, 282, 284[46]. In Fujii v California (1952)

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[45]E.g., Reynolds v Sims (1946) 377 U.S. 533, 84 S. Ct. 1362, 1386-1389; Lucas v 44th Gen. Assem. of Colorado (1964) 377 U.S. 713, 84 S. Ct. 1459, 1479 (both rejecting "federal analogy" argument that one house of state legislature may be based on counties, not population); see Takahashi v Fish & Game Comm (1948) 334 U.S. 410, 68 S. Ct. 1138; Hampton v Mow Sun Wong (1976) 426 U.S. 88, 96 S. Ct. 1895, 1903-05 (power over aliens); Matthews v Diaz (1976) 426 U.S. 67, 96 S. Ct. 1883, 1894 (same).

[46]"What may be reasonable and constitutional for Congress for one purpose may not be reasonable or constitutional for a state legislature for another and wholly distinct purpose. Otherwise, there would be few practical limitations to the power of a state to discriminate among those within its jurisdiction.****

"In other words, if a state wishes to borrow a federal classification, it must seek to rationalize the adopted distinction in the new setting. Is the distinction a reasonable one for the purposes for which the state desires to use it? To that question it is no answer that the distinction was taken

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38 Cal.2d 718, 242 Pac.2d 617, 627, cert denied, the court invalidated under the 14th Amendment the state "Alien Land Law" incorporating a presumably valid federal classification discriminating against Japanese, and held:

> [I]f a state wishes to borrow a federal system of grouping [i.e., classification], it must justify the adopted classification in its new [state] setting, and the state's use of the [federal] distinction must stand or fall on its own merits. (Emphasis added.)

See also Truax v Corrigan (1921) 257 U.S. 312, 340, 42 S. Ct. 124, 132 (state law incorporating Clayton Act in "same words" limiting state court jurisdiction denied equal protection); Senn v Tile Layer's

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from a federal statute or that the distinction may be rationalized for the purpose for which Congress used it. The state's use of the distinction must stand or fall on its own merits. And if it appears that the equal protection clause forbids the state from using the distinction for the desired purpose, the fact that Congress is free to adopt the distinction is some other connection gives the state no additional power to act upon it." (Emphasis added.)

Union (1937) 301 U.S. 468, 57 S. Ct. 857 (Brandeis, J., for the Court) (Wisconsin "Little Norris-LaGuardia Act" valid, but no mention at all of identical federal act adopted five years earlier)[47]; M Restaurants Inc. v S. F. Local Jt. Ex. Bd. (1981)--Cal. App.3d--, 177 Cal.Rptr. 690, 698, pet. for hrg. pending (California "Little Norris--LaGuardia Act" valid, not automatically because it incorporated federal act, but because it did not have purpose or effect different from federal act, was otherwise constitutional, and was consistent with overall federal labor policy).

B. Proposition 1's resegregation clause violates the 14th Amendment.

Assuming arguendo that the basic repeal of the former California desegregation requirement was valid, "it does not follow that there is no constitutional limit to the means which may be used to

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[47]Senn distinguished Truax without mentioning the Clayton Act issue in Truax.

enforce it" McLaughlin v Florida (1964) 379 U.S. 184, 195, 85 S. Ct. 283, 290; Oyama v California, supra, 332 U.S. at 646-647, 68 S. Ct. at 275. The means in Proposition 1's second paragraph are invalid.

Paragraph 2 of Proposition 1 (requiring reopening of judgments), is a resegregation clause and the heart of the law--without it mandatory desegregation already under way in Los Angeles could not have been stopped. It was the very provision invoked by respondent in the trial court below, yet the Court of Appeal failed to consider its full implications and effect.

Once a trial court reopens and sets aside a judgment, the school board is left by paragraph 2 with unfettered discretion to do as it arbitrarily pleases with the desegregated children. Paragraph 2--not containing any standards (except "the Constitution", see infra p. 57)--leaves school

boards free to require or "invite" the retransfer of desegregated children back to segregated schools. Exercise of either option as to minority children (we pass the issue of "majority" children) already attending "white" schools pursuant to the desegregation plan would stigmatize them solely because of their race by "singling them out" from all other ("majority") children attending those same schools--thus practically "affixing" a "brand upon them" "implying inferiority". Strauder v West Virginia, supra. Such a classification between "majority" children, who of course remain in their regular schools, and minority children already attending the same schools but retransferred back to "ghetto" schools, is patently void. Courts have uniformly held official resegregation unconstitutional[48].

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[48]E.g., Monroe v Bd of Comm'rs (1968) 391 U.S.
(Footnote is continued on the next page.)

Even if it is uncertain whether paragraph 2 ever will be applied in that manner, Paragraph 2 creates a risk of that happening and thus fails to "steer clear" of possible resegregation. Cf. Norwood v Harrison, supra; Gilmore v City of Montgomery (1974) 417 U.S. 556, 94 S. Ct. 2416. A law which has even the potential for official resegregation must be subject to "strict scrutiny" and, as in First Amendment cases (see supra, p. 26 note 23), courts will not presume that it "curtails constitutionally protected activity as

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450, 459, 88 S. Ct. 1700, 1705; Goss v Bd of Ed (1963) 373 U.S. 683, 686, 83 S. Ct. 1405, 1408; NAACP v Lansing Bd of Ed (6th Cir. 1972) 485 F.2d 569 (de facto situation, so far as then known); School Comm. of Springfield v State Board, supra (de facto); Reed v Rhodes (6th Cir. 1979) 607 F.2d 714, cert. denied; NAACP v Lansing Bd of Ed (1977) 559 F.2d 1042 (de jure); United States v Texas Ed. Agency (Austin) (5th Cir. 1977) 564 F.2d 162, 172; Clemmons v Bd. of Ed. (6th Cir. 1956) 228 F.2d 853, cert. denied; United States v Bd. of Sch. Comm'rs of Indianapolis, supra, 503 F.2d at 76, 77; Cf., Soria v Oxnard Sch. Dist (9th Cir. 1973) 467 F.2d 59, 60.

little as possible", and "it makes no difference whether such resegregation "would actually be commenced"; nor will it be "assumed" that "ambiguities will be resolved in favor of adequate protection of" 14th Amendment rights--"[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms". NAACP v Button (1963) 371 U.S. 415, 83 S. Ct. 328, 338, 339, 340. Further, "it will not do to say that the Constitution would prevent overbroad application" or that "judicial safeguards" will "neutralize the vice of a vague" and overbroad law. Baggett v Bullitt (1964) 377 U.S. 360, 84 S. Ct. 1316, 1323. Even to require minority children to appear in state courts to defend against possible official resegregation is a violation. Cf. Georgia v Rachel (1966) 384

U.S. 780, 86 S. Ct. 1783, 1796-1797[49].

Paragraph 2 is not saved by its prefatory clause "Except as may be precluded by the Constitution of the United States". Courts uniformly ignore such clauses, for to apply them would permit a legislature to immunize an entire law from effective judicial review merely by including such a disclaimer in the front of a whole act. See, e.g., Oregon v Mitchell (1970) 400 U.S. 112, 91 S. Ct. 260 ("except as required by the Constitution" not mentioned in 90 pages of opinions)[50].

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[49]Paragraph 2 also violates 42 U.S.C § 2000d (Title VI of 1964 Civil Rights Act); 42 U.S.C. § 1981; and 20 U.S.C. §§ 1703(a) and (e).

[50]See also the "interposition" laws, e.g., Arkansas law authorizing the Legislature to oppose the Brown decision in "every constitutional manner"; Aaron v Cooper (8th Cir. 1958) 261 F.2d 97; Aaron v McKinley (D. Ark. 1959) 173 F.Supp. 944 (3-judge court), aff'd per curiam 361 U.S. 197, 80 S. Ct. 291; Cooper v Aaron (1958) 358 U.S. 1, 78 S. Ct. 1401.

The Legislature could have explicitly said in paragraph 2 that minority children could not be

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C. Other provisions of Proposition 1 violate the 14th Amendment by misleading school boards as to their federal constitutional duties and otherwise encouraging the perpetuation of de facto and de jure segregation.

(1) The "compelling public interest" paragraph affirmatively encourages school boards to perpetuate de facto and de jure segregation.

The last paragraph of Proposition 1 states that the Legislature and People "find" and "declare" that the law is "necessary" to serve "compelling public interests", and then recites a litany of evils that supposedly flow from either "pupil transportation" or even "pupil assignment" (see Argument II, supra). The language admits of no exceptions or qualifications; it borders on an official command and expresses an official state policy

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resegregated: its failure so to do is suspicious. This, therefore, is a decidedly appropriate case for application of First Amendment rules quoted above from Baggett v Bullitt, supra (argument that "the Constitution" would prevent overbroad application rejected), and NAACP v Button, also quoted supra.

(see Peterson v Greenville (1963) 373 U.S. 244, 83 S. Ct. 1119; Lombard v Louisiana (1963) 373 U.S. 267, 83 S. Ct. 1122) that all desegregation is nothing but trouble, whatever minimal transportation or assignment is used. Indeed, unless local boards refuse to desegregate, the Legislative will expressed in ¶ 5 will be frustrated.

Such language is far from the "strictly neutral" requirement that a state must adhere to when it repeals equal rights laws by constitutional amendment. Harlan, J., concurring in Hunter v Erickson, supra, (1969) 393 U.S. at 395, 89 S. Ct. at 563; Reitman v Mulkey, supra. It violates the "fundamental principle" of the Equal Protection Clause that "the State must govern impartially". New York City Transit Authority v Beazer (1979) 440 U.S. 568, 587, 99 S. Ct. 1355, 1367. And

it is contrary to the absolutely clear mandate of this Court[51].

(2) Other provisions of Proposition 1 encourage de jure segregation by misleading school boards as to their federal duties and otherwise violate the 14th Amendment.

(a) Ostensibly, Proposition 1 affects only de jure cases brought in California courts to enforce the California constitution, but in practice it is necessarily a rule of conduct directed to school boards who are prospective parties before those courts. Proposition 1 will mislead school boards as to their 14th Amendment duties in several respects.

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[51]See Harlan J., for the Court, in Adickes v S.H. Kress (1970) 398 U.S. 144, 90 S. Ct. 1598, 1605: "Few principles are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race . . . or in any way act to compel or encourage racial segregation" (emphasis added); Moose Lodge v Irvis (1972) 407 U.S. 163, 176-177, 92 S. Ct. 1965, 1973 (law did not "in any way foster or encourage racial discrimination" (Rehnquist, J., for the Court). Nor can a state by law "discourage" desegregation Robinson v Florida (1964) 378 U.S. 153, 84 S. Ct. 1693.

(i) The "facts . . . at the time" clause of ¶ 2 will lead school boards to believe that, in determining whether they have an "affirmative duty" to desegregate, they need not examine antecedent causes going back to 1954, but only the current or immediate past boards' "intent". Dayton Bd of Ed v Brinkman (II), supra; Columbus Bd of Ed v Penick (1979) 443 U.S. 449, 99 S. Ct. 2941.

(ii) Paragraph 1 limits state courts to correcting "specific" de jure "violations", and will suggest to school boards that they need not undertake "system-wide" remedies, even if segregation was "system-wide" in the past with system-wide effects, contrary to Keyes-Dayton II-Columbus (and even Dayton I).

(b) Paragraph 3 requires courts to give priority on the docket to applications for resegregation over all other civil actions--which includes other actions

seeking relief from de jure segregation in other school districts or from any other kind of racial discrimination, a non-neutral structuring of the state's judicial system (cf., Harlan, J., concurring in Hunter v Erickson; Rose v Mitchell), violating the 14th Amendment and 42 U.S.C. § 1981.

CONCLUSION

For all the reasons set forth above, Amici respectfully urge the Court to hold Proposition 1 unconstitutional under the Thirteenth and Fourteenth Amendments and, accordingly, to reverse the judgment of the California Court of Appeal, Second Appellate District.

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